TITLE XXX.

Provisions Common to Actions and Proceedings in All Courts.

CHAPTER 325.

WITNESSES AND ORAL TESTIMONY.

325.01 Subpœnas, who may issue. The subpœna need not be sealed, and may be signed and issued as follows:

(1) By any judge or clerk of a court or court commissioner or justice of the peace, or police justice within the territory in which such officer or the court of which he is such officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

(2) By the attorney-general or any district attorney or person acting in his stead, to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate and from any part of the state.

(3) By the chairman of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof.

(4) By any arbitrator, coroner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the commissioner of taxation and the secretary of the state board of dental examiners and by any agent of the state department of agriculture.

325.02 Form of subpœna. (1) The subpœna may be in the following form:

SUBPŒNA.

STATE OF WISCONSIN, ... County. } ss.

THE STATE OF WISCONSIN, to ....:

You are hereby required to appear before ...., a justice of the peace in and for said county, at his office in the town of .... (or before ...., designating the court, officer or person and place of appearance), on the .... day of ...., at .... o'clock in the .... noon of said day, to give evidence in a certain cause then and there to be tried between ...., plaintiff, and ...., defendant, on the part of the .... (or to give

evidence in the matter [state sufficient to identify the matter or proceeding in which the evidence is to be given] then and there to be heard, on the part of ....).

Given under my hand this .... day of ...., 19...

....
(Give official title)

(2) For a subpœna duces tecum, the following or its equivalent may be added to the foregoing form (immediately before the attestation clause): and you are further required to bring with you the following papers and documents (describing them as accurately as possible).

325.03 Service of subpœna. Any subpœna may be served by any person by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at his abode.

325.04 Justice subpœna, served in adjoining county. A subpœna to require attendance before a justice of the peace may be served in a county adjoining that of the justice, and shall oblige such attendance of any witness, so served, not residing more than thirty miles from the office of such justice.

325.05 Witness' and interpreter's fees. (1) The fees of witnesses and interpreters shall be as follows:

(a) For attending before a justice of the peace, or any arbitrators or any board or committee thereof of any town, city or village, for witnesses $4 for each day, for interpreters $4 per day.

(b) For attending before any other court, officer, board or committee, for witnesses $5 for each day, for interpreters $7 per day.

(c) For traveling, at the rate of five cents per mile going and returning from his residence (if within the state); or, if without, from the point where he crosses the state boundary in coming to attend to the place of attendance, and returning by the usually traveled route between such points.

(2) A witness or interpreter shall be entitled to fees only for the time he shall be in actual and necessary attendance as such; and shall not be entitled to receive pay in more than one action or proceeding for the same attendance or travel on behalf of the same party. No person shall be entitled to fees as a witness or interpreter while attending court as an officer or juror; nor shall any attorney or counsel in any cause be allowed any fee as a witness or interpreter therein.

History: 1951 c. 17; 1953 c. 314; 1955 c. 516.

325.06 Witness' fees, prepayment. (1) Except when subpoenaed on behalf of the state, no person shall be obliged to attend as a witness in any civil action, matter or proceeding unless his fees are paid or tendered to him for one day's attendance and for travel; provided that tender of witness fees in the form of a check drawn by the state, a political subdivision of the state, a municipal corporation of the state or a department or officer of any of them which is payable to bearer or payable to the order of the person named in such subpoena shall oblige the person named in such subpoena to attend as a witness in accordance with the lawful requirements of such subpoena.

(2) No witness on behalf of the state in any civil action, matter or proceeding, or in any criminal action or proceeding, on behalf of either party, shall be entitled to any fee in advance, but shall be obliged to attend upon the service of a subpœna as therein lawfully required.

History: 1957 c. 193.

325.07 State witnesses in civil actions, how paid. Every witness on behalf of the state in any civil action or proceeding may file with the clerk of the court where the same is pending his affidavit of attendance and travel, and his fees shall, upon the certificate of such clerk, countersigned by the attorney-general, district attorney, or acting state's attorney, be paid out of the state treasury, and shall be charged to the legal expense appropriation to the attorney-general.

325.08 State witnesses in criminal cases, how paid. The fees of witnesses on the part of the state in every criminal action or proceeding, and of every person who is committed to jail in default of security for his appearance as a witness, shall be paid by the county in which the action or proceeding is had. The clerk of the court upon proof of his attendance, travel or confinement shall give each such witness or person a certificate of the number of days' attendance or confinement, the number of miles traveled, and the amount of compensation due him, which certificate shall be receipted for by such witness or person, and the county treasurer shall pay the amount thereof on surrender of the certificate.

Cross Reference: For fees of expert witnesses, see 957.27.

325.09 Compensation of nonresident or poor witness. When any witness shall attend a court of record in behalf of the state, and it shall appear that he came from outside this state, or that he is poor, the court may order he be paid a specific reasonable sum for his expense and attendance, in lieu of his fees; and thereupon the clerk shall give a certificate for such sum, with a copy of such order affixed, and the same shall be paid as other court certificates are paid.

325.10 Witness for indigent defendant. Upon satisfactory proof of the inability of the defendant to procure the attendance of witnesses for his defense, the judge, court commissioner, or justice of the peace, in any criminal action or proceeding to be tried or heard before him, may direct such witnesses to be subpœnaed as he shall, upon the defendant's oath or affidavit, or that of his attorney, deem proper and necessary. And witnesses so subpœnaed shall be paid their fees in the manner that witnesses for the state therein are paid.

325.11 Disobedient witness. (1) DAMAGES RECOVERABLE. If any person obliged to attend as a witness shall fail to do so without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in an action.

(2) ATTENDANCE COMPELLED. Every court, in case of unexcused failure to appear before it, may issue an attachment to bring such witness before it for the contempt, and also to testify.

(3) PUNISHMENT IN COURTS. Inexcusable failure to attend any court of record shall be a contempt of the court, punishable by a fine not exceeding twenty dollars.

(4) SAME. Unexcused failure to attend a court not of record shall be a contempt, and the witness shall be fined all the costs of his apprehension, unless he shall show reasonable cause for his failure; in which case the party procuring him to be apprehended shall pay said costs.

(5) STRIKING OUT PLEADING. If any party to an action or proceeding shall unlawfully refuse or neglect to appear or testify or depose therein (either within or without the state), the court may, also, strike out his pleading, and give judgment against him as upon default or failure of proof.

325.12 Coercing witnesses before officers and boards. If any person shall, without reasonable excuse, fail to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take, testimony, or to produce a book or paper which he was lawfully directed to bring, or to subscribe his deposition when correctly reduced to writing, any judge of a court of record or court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for him, and unless he shall purge the contempt and go and testify or do such other act as required by law, may commit him to close confinement in the county jail until he shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.

325.13 Party may be witness, credibility. (1) No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest therein; and every person shall, in every such case, be a competent witness, except as otherwise provided in this chapter. But his interest or connection may be shown to affect the credibility of the witness.

(2) In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto.

(2) does not bar testimony that the defendant refused a request of a police officer to furnish a sample of urine for chemical analysis to determine its alcoholic content. Barron v. Covey, 271 W 10, 72 NW (2d) 387.

325.14 Adverse examination at trial; deposition as evidence; rebuttal. (1) Any party or any person for whose immediate benefit any civil action or proceeding is prosecuted or defended, or his or its assignor, officer, agent or employe, or the person who was such officer, agent or employe at the time of the occurrence of the facts made the subject of the examination, may be examined upon the trial as if under cross-examination, at the instance of any adverse party. Any other party adverse in interest may then re-examine such witness as to all matters tending to explain or qualify testimony given by him and if he does not intend thereafter to make the witness his witness may ask him questions proper for the purpose of impeachment.

(2) The testimony so taken on the trial or pursuant to section 326.12 shall not conclude the party taking the same, but he shall be allowed to rebut or impeach the same.

See note to 326.12, citing Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

Where a person was called as an adverse witness by the defendant and no objection

was made at the time he was examined as to his being an adverse witness, the defendant was entitled to impeach such adverse witness with his former testimony given on his adverse examination, and in connection therewith a sketch made by him of the scene of the accident was properly admitted in evidence although it was unverified and not drawn to scale. Allen v. Zabel, 261 W 172, 52 NW (2d) 393.

The right of impeachment gives to the party who has called the adverse witness the right to show that his testimony is unreliable or is contrary to the fact, by proof directed against the matters testified to, including the witness' prior inconsistent conduct or statements concerning such matters but, until and unless the witness takes the stand in his own behalf, it does not authorize impeachment of his character and credibility generally by the party who has called him to testify adversely. Alexander v. Meyers, 261 W 384, 52 NW (2d) 881.

Wife-guest sued only husband's insurance carrier for less than the policy limits. Since husband would not be liable under any judgment obtained, he could not be called and examined as an adverse witness under (1). Voss v. Metropolitan Casualty Ins. Co. 266 W 150, 63 NW (2d) 96.

The probate of a will is a judicial proceeding, and the interests of the proponent and the objectors are adverse. In proceedings on objection to the admission to probate of a will naming as sole beneficiary and sole executor a person not related to the testator, the objectors should have been permitted to examine the proponent-beneficiary as an adverse party at the trial. Error in refusing to permit the objectors to examine the proponent-beneficiary as an adverse party at the trial was not prejudicial, in view of the latitude given to the objectors when they then examined the proponent as their own witness, and in view of the fact that, at the close of the proponent's testimony in her own behalf under questioning by her attorney, the objectors were given an opportunity to cross-examine her but declined to do so. Estate of Borzych, 267 W 526, 66 NW (2d) 164.

In a proceeding contesting an annexation of territory by a city, the circulators of the petition could not be called as adverse witnesses. Greenfield v. Milwaukee, 272 W 388, 75 NW (2d) 434.

325.15 Immunity. No person shall be excused from attending, testifying or producing books, papers, and documents before any court in a prosecution under s. 134.05 on the ground or for the reason that the testimony or evidence required of him may tend to criminate him, or to subject him to a penalty or forfeiture. But no person who testifies or produces evidence in obedience to the command of the court in such prosecution shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; provided, that no person shall be exempted from prosecution and punishment for perjury committed in so testifying.

325.16 Transactions with deceased or insane persons. No party or person in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his own behalf, introduce testimony of himself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives his or its interest or title, shall be so examined, except as aforesaid.

A person named as an executor and a trustee in a will, and authorized to make reasonable charges for his legal services in addition to the statutory executor's fees, is not barred from testifying in a contested proceeding for the probate of the will as to observations and his opinion as to mental capacity of the testator, based on such observations. Will of Williams, 256 W 338, 41 NW (2d) 191.

See note to 238.16, citing Will of Repush, 257 W 528, 44 NW (2d) 240.

A claimant is competent to testify, in support of a claim against the estate of a deceased person, that he performed services for the deceased, and as to their nature and reasonable value. Kirkpatrick v. Milks, 257 W 549, 44 NW (2d) 574.

In proceedings on claims against an estate for board, lodging, nursing services, and other care rendered to an invalided and helpless decedent by the decedent's son and the son's wife, who was a practical nurse, the evidence sustained findings that the decedent had promised that the claimants would be paid therefor after the decedent's death, that the claimants had performed the agreement, and that the reasonable value of the services rendered was, respectively $20 and $30 per week. The protection of this section against the testimony of a claimant concerning his transactions with the decedent is waived by the failure of the decedent's representative to make timely objection thereto, and also by cross-examination of the otherwise incompetent witness regarding the transactions. Once the competency of the witness is established by the waiver, the weight to be given to his testimony is a matter for the trial court. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

Where an objection to the competency of a witness to testify as to conversations with a deceased person is sustained, but there is no showing by offer of proof as to what the witness would have testified, the supreme court cannot determine on appeal whether the ruling was prejudicial, unless prejudice is self-apparent. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

The words "by him personally," which immediately follow the words "transaction or communication," qualify such latter words wherever they thereafter appear. In an action of unlawful detainer by corporation lessors against a corporation lessee, this section applies to a witness-officer of the plaintiffs in relation to conversations with a deceased officer of the defendant; and the defendant's offering of a letter from its deceased officer to another officer of the plaintiffs (not the witness) did not open the door so as to make the witness competent to testify as to conversations had by him with the defendant's deceased officer, since such letter was not a transaction or communication in which the witness personally par-

ticipated. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

Where there was sufficient competent and credible evidence to support the findings of the trial court as to the paternity of a child born to the decedent's mother before the mother's marriage, the admission of the testimony of certain interested parties who were or may have been incompetent to testify relative to conversations with deceased persons, bearing on such issue of paternity, was not prejudicial. Estate of Engelhardt, 272 W 275, 75 NW (2d) 631.

A daughter-in-law of a prior owner who had no interest in the property in question, from whom neither party derived his interest, and who had no interest in the lawsuit was competent to testify as to conversations between deceased prior owners. Rohr v. Schoemer, 1 W (2d) 283, 83 NW (2d) 679.

325.17 Transactions with deceased agent. No party, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

325.18 Husband and wife. A husband or wife shall be a competent witness for or against the other in all cases, except that neither one without the consent of the other, during marriage, nor afterwards, shall be permitted to disclose a private communication, made during marriage, by one to the other, when such private communication is privileged. Such private communication shall be privileged in all except the following cases:

(1) Where both husband and wife were parties to the action;

(2) Where such private communication relates to a charge of personal violence by one upon the other;

(3) Where one has acted as the agent of the other and such private communication relates to matters within the scope of such agency.

(4) Where such private communication relates to a charge of pandering or prostitution.

History: 1955 c. 696.

Cross Reference: As to testimony of husband and wife in action asserting illegitimacy of child born in wedlock, see 328.39.

325.19 Convict. A person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer.

If this section is to be construed so as to require a defendant to answer as to the nature of a previous offense, such authority extends only when the evidence of a previous conviction has been brought out on the cross-examination of the defendant or by the record, and not where the defendant testifies on his direct-examination to previous convictions. State v. Adams, 257 W 433, 43 NW (2d) 446.

When the defendant, on trial for incest, took the stand as a witness in his own behalf, the district attorney could properly cross-examine him as to prior convictions, as affecting his credibility, but permitting the district attorney, over objection, to cross-examine him as to arrests and as to the nature of such offenses, was prejudicial error, requiring a new trial. State v. Raether, 259 W 391, 48 NW (2d) 483.

Where a defendant testified on the merits and testified on direct examination as to previous convictions, and the district attorney cross-examined him as to such previous convictions, but defense counsel did not object to such cross-examination until later in the trial, and the trial court then struck such cross-examination and instructed the jury to disregard the testimony and further instructed that previous convictions might be considered by the jury only for the purpose of enabling them to determine the credibility of such defendant as a witness, no prejudicial error was committed. State v. Kopacka, 260 W 505, 50 NW (2d) 917.

325.20 Confessions to clergymen. A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.

325.21 Communications to doctors. No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition.

The decedent's attending physician, who was a witness to a note payable to a claimant who had worked on decedent's farm and took part in the transaction resulting in its

execution, was competent to testify concerning the transaction, so far as his testimony related to information not acquired by him in a professional character to enable him professionally to serve such patient. Kirkpatrick v. Milks, 257 W 549, 44 NW (2d) 574.

See note to 269.57, citing Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

Where a physician, with the consent of the party, took a blood sample which the coroner wanted taken for the purpose of having the same examined for alcoholic content, and the physician testified that it was not necessary for him to take the sample in order to treat the party as a patient, and the taking of the sample was completed before he treated the injuries of the party, the physician was not incompetent to testify, as to matters relating to the taking of the sample. Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

It is proper for the superintendent of the Winnebago state hospital to release as much information as is necesary to an insurance company to establish proof of loss and meet the requirements of a hospitalization policy, upon the consent of the beneficiary. 39 Atty. Gen. 346.

325.22 Communications to attorneys. An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment. This prohibition may be waived by the client, and does not include communications which the attorney needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or being made public.

Even testimony received without objection is incompetent if it relates to a communication embraced within this section, but an attorney who draws a will is not barred from testifying, as to observations, opinion as to sanity, and the basis therefor, and circumstances, directions, and any other matters made known to him for the purpose of being communicated to another or being made public. Will of Williams, 256 W 338, 41 NW (2d) 191.

When litigation arises between attorney and client and the disclosure of privileged communications becomes necessary to protect the attorney's rights, the attorney is released from those obligations of secrecy which the law places on him, but only to the extent that it is necessary to disclose such communications for his own protection. State v. Markey, 259 W 527, 49 NW (2d) 437.

Where an attorney, who had drawn the last will as well as several previous wills of a testator, signed the last will as well as the previous ones as an attesting witness, the privilege must be deemed to have been waived by the testator. The attorney should be required to testify to any relevant and material matter regarding such will, including any former wills in his possession. Estate of Landauer, 261 W 314, 52 NW (2d) 890, 53 NW (2d) 627.

If former wills and codicils had been found among the papers of a testatrix, which were in her possession at the time of her death, such wills and codicils would be admissible in evidence in proceedings in her estate if their contents were otherwise material or relevant to the issue of the controversy being tried, irrespective of the coincidence that the executor who took over the custody of such instruments after the death of the testatrix was an attorney and they had been drafted either by him or by one of his law partners since, under such a state of facts, the question of whether they constituted privileged communications between client and attorney would not be presented. Where it appeared that all of various former wills and codicils of the testatrix, drafted either by a certain attorney or by one of his law partners, were in the possession of himself and his law partners as the testatrix's attorneys, the fact that they had been drafted by him or by one of his law partners would not be material on the issue of whether such former wills and codicils in the possession of himself, or his law firm, constituted privileged communications on the part of the testatrix, since the privilege extends to written instruments held by counsel or attorneys on behalf of clients. Estate of Smith, 263 W 441, 57 NW (2d) 727.

This section, as amended by ch. 523, Laws 1927, is a reenactment of the common law. The reasons of the rule apply in cases of conflict between the client or those claiming under him, and third persons, although not applying in cases of testamentary dispositions by the client as between different parties, all of whom claim under him. Where, in proceedings brought in the estate of a testatrix by the nieces of the predeceased husband of the testatrix, they claimed half of the property which the testatrix had received from the husband by his will, but their claim was based on the testatrix's breach of an alleged contract made between the husband and her under which he bequeathed practically all of his estate to her in return for her promise to bequeath half thereof to these claimants, they were not claiming under or through the testatrix but were asserting an adverse claim against her estate represented by the executor, who did claim under her, so that the rule of privileged communications between client and attorney applied to former wills and codicils of the testatrix in the possession of an attorney as her attorney at the time of her death and not in his possession in his capacity as executor, and he was not required to produce them, or to testify to their contents, including whether he was named as executor in such former wills and codicils. (Estate of Landauer, 261 W 314, distinguished.) Estate of Smith, 263 W 441, 57 NW (2d) 727.

Prior wills of a testator, in the possession of an attorney who had drafted them, were the testator's property and, on the attorney's death, it was the duty of his executor to return them to the testator's executors and, in proceedings on objections made to the probate of a later will, they were admissible so far as material or relevant to the controversy being tried. (Estate of Smith, 263 W 441.) Estate of Landauer, 264 W 456, 59 NW (2d) 676.

The rule of privilege of communications between attorney and client does not apply in litigation, after the client's death, between parties all of whom claim under the client, so that, where the controversy is to determine who shall take the property of the deceased person, and where both parties claim under him, neither can set up a claim of privilege against the other as regards communications of the deceased with his attorney. Estate of Brzowsky, 267 W 510, 66 NW (2d) 145, 67 NW (2d) 384.

This section does not preclude an attorney from testifying as to transactions had with or communications made to him by third persons even though those matters came to his knowledge in consequence of his retainer as an attorney. Tomek v. Farmers Mut. Automobile Ins. Co. 268 W 566, 68 NW (2d) 573.

In an action by an insurer against a co-defendant to recover the amount paid in settlement of a claim, plus attorney fees, an opinion of the attorneys was privileged, and the disclosure of it was not shown to be necessary to a defense of the issue involved, which was whether the fees were reasonable. Continental Casualty Co. v. Pogorzelski, 275 W 350, 82 NW (2d) 183.

A client's communication to his attorney in pursuit of a criminal or fraudulent act to be performed is not privileged in any judicial proceeding. In re Sawyer's Petition, 229 F. (2d) 805.

325.23 Blood tests in civil actions. Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall

direct any party to the action and any person involved in the controversy to submit to one or more blood tests as provided in s. 52.36. The results of said tests shall constitute conclusive evidence where exclusion is established and shall be receivable as evidence, but only in cases where a definite exclusion is established. Whenever the court orders such blood tests and one of the parties refuses to submit to such tests such fact shall be disclosed upon trial. Notwithstanding the provisions of s. 52.36 (2) the court shall determine how and by whom the costs of such examination shall be paid.

History: 1957 c. 180.

325.235 Chemical tests for intoxication. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant while operating or handling a vehicle or firearm, evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood, urine or saliva is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved. Such chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) The fact that the analysis shows that there was five-hundredths of one per cent or less by weight of alcohol in the person's blood is prima facie evidence that he was not under the influence of an intoxicant;

(b) The fact that the analysis shows that there was more than five-hundredths but less than fifteen-hundredths of one per cent by weight of alcohol in the person's blood is relevant evidence on the issue of intoxication but is not to be given any prima facie effect;

(c) The fact that the analysis shows that there was fifteen-hundredths of one per cent or more by weight of alcohol in the person's blood is prima facie evidence that he was under the influence of an intoxicant, but shall not, without corroborating physical evidence thereof, be sufficient upon which to find the person guilty of being under the influence of intoxicants.

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood, urine or saliva was not taken within 2 hours after the event to be proved, evidence of the amount of alcohol in the person's blood as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if such effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant.

History: 1955 c. 510.

See note to sec. 11, art. I, citing State v. Resler, 262 W 285, 55 NW (2d) 35.

In civil actions, expert testimony based on the percentage of alcohol in the blood is admissible to determine intoxication, and in civil actions arising out of automobile collisions, where the allegedly intoxicated person was not arrested on any charge, the results of the blood tests are not rendered inadmissible by the fact that the tests were not taken within the time limited by 85.13 (4), Stats. 1953. Testimony of witnesses that they smelled intoxicating liquor on the breath of a party after the collision, together with evidence as to the party's method of driving before the collision, was sufficient corroborating physical evidence of intoxication, if such corroborating evidence was necessary to the admissibility of the results of the blood tests. Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

See note to 325.13, citing Barron v. Covey, 271 W 10, 72 NW (2d) 387.

See note to sec. 8, art. 1, State v. Kroening, 274 W 266, 79 NW (2d) 810, 80 NW (2d) 816.

325.24 Actions for public moneys, immunity. No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received by or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the state or any municipality, involving the official conduct of any officer thereof, shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony.

325.25 State actions vs. corporations. (1) No corporation shall be excused from producing books, papers, tariffs, contracts, agreements, records, files or documents, in its possession, or under its control, in obedience to the subpœna of any court or officer authorized to issue subpœnas, in any civil action which is now or hereafter may be pending, brought by the state against it to recover license fees, taxes, penalties or forfeitures, or to enforce forfeitures, on the ground or for the reason that the testimony or evidence, docu-

mentary or otherwise, required of it, may subject it to a penalty or forfeiture, or be excused from making a true answer under oath, by and through its properly authorized officer or agent, when required by law to make such answer to any pleading in any such civil action upon any such ground or for such reason.

(2) No officer, clerk, agent, employe or servant of any corporation in any such action shall be excused from attending or testifying or from producing books, papers, tariffs, contracts, agreements, records, files or documents, in his possession or under his control, in obedience to the subpœna of any court in which any such civil action is pending or before any officer or court empowered or authorized to take deposition or testimony in any such action, in obedience to the subpœna of such officer or court, or of any officer or court empowered to issue a subpœna in that behalf, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or a forfeiture, but no such officer, clerk, agent, employe or servant shall be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or officer, or any court or officer empowered to issue subpœna in that behalf, or in any such case or proceeding except a prosecution for perjury or false swearing in giving such testimony.

(3) In case of the failure or neglect of any corporation, or of any such officer, clerk, agent, employe or servant, to produce any such book, paper, tariff, contract, agreement, record, file or document, secondary evidence of the contents of any or either of the same may be given, and such secondary evidence shall be of the same force and effect as the original.

325.27 Admission by member of corporation. In actions or proceedings by or against a corporation, the admission of any member thereof who is not a party to the action or proceeding shall not be received as evidence against such corporation unless such admission was made concerning some transaction in which such member was the authorized agent of the corporation.

325.28 Statement of injured, admissibility. In actions for damages caused by personal injury, no statement made or writing signed by the injured person within seventy-two hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as part of the res gestæ.

325.29 Testimony of judge of kin to attorney. No judge of any court of record shall testify as to any matter of opinion in any action or proceeding in which any person related to such judge in the first degree shall be an attorney of record.

Permitting a beneficiary of a larger bequest under a previous will to testify as to transactions and conversations with the testatrix is deemed of no consequence, in respect to judge's conclusion as to the existence of undue influence, which was supported by sufficient other and concededly competent evidence. Estate of Maxcy, 258 W 360, 46 NW (2d) 479.

325.30 Capacity to testify. The court may examine a person produced as a witness to ascertain his capacity and whether he understands the nature and obligations of an oath.

The trial court's examination of a witness under oath to ascertain her capacity to testify was correct procedure and in connection therewith the court's refusal to receive proof which might impeach the credibility of such witness, but which would have been of no aid to the court in determining the question at issue, was not error. State v. Wrosch, 262 W 104, 53 NW (2d) 779.

325.31 Testimony of deceased or absent witness. The testimony of a deceased witness, or a witness absent from the state, taken in any action or proceeding (except in a default action or proceeding where service of process was obtained by publication), shall be admissible in evidence in any retrial, or in any other action or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine said witness, and where the issue upon which it is offered is substantially the same as the one upon which it was taken.

Testimony given by the testator, while under guardianship, in proceedings involving a controversy between the same parties over certain deeds executed by the testator, should have been received in evidence as having a definite bearing on the issues involved in the instant proceedings. Estate of Brzowsky, 267 W 510, 66 NW (2d) 145, 67 NW (2d) 384.

325.33 Extradition of witnesses. (1) DEFINITIONS. "Witness" as used in this section shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word "state" shall include any territory of the United States and the District of Columbia. The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

(2) SUMMONING WITNESS IN THIS STATE TO TESTIFY IN ANOTHER STATE. (a) If a judge of a court of record in any state which by its laws has made provision for com

manding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(c) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

(3) WITNESS FROM ANOTHER STATE SUMMONED TO TESTIFY IN THIS STATE. (a) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

(4) EXEMPTION FROM ARREST AND SERVICE OF PROCESS. (a) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(5) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted as to make uniform the law of the states which enact it.

325.34 Incriminating testimony compelled; immunity. Whenever any person shall refuse to testify or to produce books, papers or documents when required to do so in any criminal examination, hearing or prosecution for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such evidence by order of the court on motion of the district attorney. But no person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; but no person shall be exempted from prosecution and punishment for perjury committed in so testifying.

325.35 Hostile witness in criminal cases. Where testimony of a witness on the trial in a criminal action is inconsistent with a statement previously made by him and reduced to writing and approved by him or taken by a phonographic reporter, he may, in the discretion of the court, be regarded as a hostile witness and examined as an adverse witness, and the party producing him may impeach him by evidence of such prior contradictory statement.

This section was not intended to change the long-established rule that previous inconsistent statements of a witness cannot be accorded any value as substantive evidence. Impeachment goes only to the credibility of the witness and the negation of his testimony. State v. Major, 274 W 110, 79 NW (2d) 75.